Filed 12/29/04 P. v. Torres CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. EMILIO TORRES, Defendant and Appellant.	C044132 (Super. Ct. Nos. 02F01623 & 00F10227)

In case No. 02F01623, a jury convicted defendant Emilio Torres of second degree burglary (Pen. Code, § 459),[1] receiving stolen property (§ 496, subd. (a)), and possessing burglar tools (§ 466). In a bifurcated proceeding, defendant admitted that he committed the offenses while released from custody on bail (§

[1] All further statutory references are to the Penal Code unless otherwise indicated.

12022.1). Defendant then entered into a negotiated agreement in case No. 00F10227, in which he pleaded no contest to seven felony counts[2] that included two on-bail enhancements, in return for a stipulated sentence of 15 years in prison for both cases.[3]

Defendant appeals, claiming that the trial court erred in case No. 02F01623 by (1) failing to instruct the jury that defendant's admissions should be viewed with caution, pursuant to CALJIC No. 2.71, and (2) instructing the jury pursuant to CALJIC No. 2.27 without deleting references to corroboration. We shall affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND[4]

About 5:20 a.m. on February 19, 2002, Sacramento Sheriff's Department Sergeant David Wilson was patrolling a Beazer Homes

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[2] The seven felony counts were second degree robbery (§ 211), possession for sale of methamphetamine (Health & Saf. Code, § 11378; two counts), possession of an assault weapon (§ 12280, subd. (b)), unlawful driving or taking a vehicle (Veh. Code, § 10851, subd. (a)), computer access fraud (§ 502, subd. (c)(1)(A)), and identity theft (§ 530.5, subd. (a)).

[3] The court calculated the 15-year sentence as follows: the upper term of five years for the second degree robbery; a consecutive one-third the midterm, or eight months, for each count of possession of methamphetamine for sale, possession of an assault weapon, unlawful driving or taking of a vehicle, identity theft, and second degree burglary; a concurrent one-third the midterm, or eight months, for the computer access fraud; a consecutive two years for each of three on-bail enhancements; and a stayed one-third the midterm for receiving stolen property.

[4] The background will discuss facts related to case No. 02F01623 as defendant's issues on appeal relate only to this case.

construction site in South Sacramento. He noticed a pickup truck traveling at a quick rate of speed and stopped the truck after it failed to stop at a stop sign.

Defendant was the driver and one Robert Rice[5] was the passenger. Rice appeared to be sleeping. Sergeant Wilson saw a copy machine and an office telephone in the open bed of the truck. Defendant explained that he was at the construction site to drop off shovels for his boss. Defendant could not remember his boss's name or telephone number.

A search of the inside of the truck revealed several folders that contained Beazer Homes sales information and lot maps. Also inside the truck was a large duffel bag that contained a Beazer Homes book, six screwdrivers, various types of wrenches, two pairs of pliers, dent pullers, bolt cutters, a slide hammer tool, and the birth certificate of defendant's brother, Enrique Torres. Also found were two jackets with dust or powder on them that could have rubbed off of fixtures inside a Beazer Homes construction trailer. Defendant had on his person part of a porcelain spark plug tied to a string. An expert in the area of burglar tools opined that tools found in the duffel bag and the porcelain spark plug were burglar tools.

One of the trailers at the construction site had been broken into and a telephone and copy machine were missing. A superintendent for Beazer Homes identified the copy machine,

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[5] Rice was charged as a codefendant but was not tried in these proceedings.

telephone, and paperwork in defendant's truck as items missing from the construction trailer.

Defendant was questioned after being advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]. He said that he did not steal anything and did not know anything about the property in the back of his truck. He also said that he had the spark plug to break into his own Toyota Forerunner.

Defendant's mother, Rosa Torres, was the sole witness that testified for the defense. On the day defendant was arrested, she had received a telephone call from Robert Rice, who had been living with her and her sons. Rice was stranded because he had just fought with his girlfriend and asked to speak with defendant. After speaking with Rice, defendant took his brother Enrique's car and went to find Rice. According to Torres, Enrique worked construction and the duffel bag found in the truck was Enrique's work bag.

DISCUSSION

I.

CALJIC No. 2.71

Defendant contends the court erred by failing to give sua sponte the pattern CALJIC No. 2.71 instruction that requires the jury to view with caution defendant's out-of-court admissions.[6]

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[6] CALJIC No 2.71 reads: "An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when

He argues that the exculpatory statements he made to the police regarding dropping off tools for his boss and his lack of knowledge about the stolen property in the back of the truck were admissions and that the failure to instruct the jury pursuant to CALJIC No. 2.71 was prejudicial. The People contend that the failure to give the instruction was harmless.

California courts disagreed in the past on whether exculpatory, nonhearsay statements were admissions requiring trial courts to give CALJIC No. 2.71 sua sponte. (See *People v. Brackett* (1991) 229 Cal.App.3d 13, 18-20; *People v. Mendoza* (1987) 192 Cal.App.3d 667, 675-676; and *People v. La Salle* (1980) 103 Cal.App.3d 139, 150-151, 153, disapproved on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 498.) The California Supreme Court appears to agree with the broad definition of admission set forth in *Mendoza* as "'any extrajudicial statement -- whether inculpatory or exculpatory -- "which tends to prove [a defendant's] guilt when considered with the rest of the evidence."'" (*People v. Garceau* (1993) 6 Cal.4th 140, 179-180.)

Assuming that defendant's statements were admissions and that CALJIC No. 2.71 applied, we conclude the court's failure to give the instruction does not require reversal on the facts of this case. Failure to instruct pursuant to CALJIC No. 2.71

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considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part. [¶] [Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution.]"

constitutes reversible error only if, upon a reweighing of the evidence, it appears reasonably probable that the jury would have reached a result more favorable to defendant. (*People v. Carpenter* (1997) 15 Cal.4th 312, 393; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The purpose of the cautionary instruction is to assist the jury in determining whether the defendant did in fact make the statement he is reputed to have made. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200.) At trial defendant did not question whether the statements were actually made or claim that the police did not accurately remember their conversations with defendant. There was no conflicting testimony concerning the precise words used or their context. In fact, defense counsel argued in closing argument that defendant lied to the police regarding where he had been and what he had been doing to cover for his friend, Robert Rice, who was the one who committed the burglary of the construction site.

Moreover, the prosecution argued in closing argument that defendant's guilt was proven beyond a reasonable doubt not simply because of the lies he told the police but also because of other evidence that strongly pointed to defendant's guilt such as: the burglar tools in the truck, the residue on the two jackets that was consistent with powder from the fixtures in the construction trailer, the presence in the truck's bed of the items missing from the trailer, and defendant's failure to stop at the stop sign that indicated his desire to leave the construction site quickly.

Moreover, the jury was otherwise instructed on the relevant factors to evaluate the credibility of witnesses, including CALJIC No. 2.20, credibility of witness; CALJIC No. 2.21.1, discrepancies in testimony; CALJIC No. 2.22, weighing conflicting testimony; and CALJIC No. 2.27, sufficiency of testimony of one witness. These instructions adequately informed the jury of its duty to determine the believability of the witnesses and of each part of their testimony and the weight to which the testimony was entitled.

Based on the foregoing, we conclude "there is no reasonable possibility that the failure to give the cautionary instruction affected the . . . verdict." (*People v. Livaditis* (1992) 2 Cal.4th 759, 784, citing *People v. Stankewitz* (1990) 51 Cal.3d 72, 94.)

II.

CALJIC No. 2.27

Defendant claims that the trial court erred in not deleting references to corroboration in CALJIC No. 2.27. He contends the instruction as given misled the jury into believing that, unless a single witness's testimony was corroborated, it "should carefully review" the evidence related to any fact testified to by that witness. Defendant asserts the instruction as given was prejudicial because the instruction applied only to defendant's mother, Rosa Torres, as she was the single witness that testified to defendant's version of events. The People contend that any error in giving the instruction was harmless. We agree.

The court instructed the jury with CALJIC No. 2.27 in full, which reads as follows: "You should give the uncorroborated testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe, concerning any fact whose testimony about that fact does not require corroboration is . . . sufficient proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends." The Use Note to CALJIC No. 2.27 provides that the bracketed phrases should be used when "corroboration of a witness's testimony is required, such as in Penal Code [section] 1103a (Perjury), 1108 (abortion or enticement for prostitution), 1111 (testimony of accomplice), and 653f (solicitation to commit felony)." None of the charged crimes or defenses in this case required corroboration, but the trial court nonetheless included the bracketed phrases in the instruction.

However, the possibility that any prejudice arose from the instruction is remote. The instruction simply told the jury that a single witness's testimony is sufficient if believed, and it should consider the evidence in support of that testimony carefully. Moreover, defendant's mother's testimony regarding defendant's alibi left unexplained evidence that pointed to defendant's guilt such as the two jackets with residue, the spark plug on defendant's person, and defendant's statement to police that he had gone to the construction site to return shovels to his boss yet could not recall his boss's name or telephone number. Thus, it is likely that the jury rejected the

mother's testimony, not because it was uncorroborated, but because it conflicted with the credible testimony of the police and the construction superintendent. Accordingly, any error in instructing the jury pursuant to CALJIC No. 2.27 was harmless under any prejudice-based standard of reversible error. (*Chapman v. California* (1967) 386 U.S. 18, 22 [17 L.Ed.2d 705, 709-710] [harmless beyond a reasonable doubt standard]; *Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674, 697-698] [reasonable probability that, but for counsel's unprofessional errors, the result would have been different]; *People v. Watson, supra,* 46 Cal.2d at p. 836 [reasonable probability of a different result].)

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

HULL, J.